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MICHAEL SODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS
IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1978 (Pet. App. 1). The petition for a writ of certiorari was filed on September 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission may condition approval of power plant construction on the rerouting of transmission lines in order to minimize adverse environmental impacts.

STATUTES INVOLVED

The relevant portions of the Atomic Energy Act, Sections 11(v), 11(cc) and 271, 42 U.S.C. 2014(v), 2014(cc) and 2018, are set forth at Pet. App. 117. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, is set forth at Pet. App. 118-120.

STATEMENT

In January 1974, the Public Service Company of New Hampshire (PSCO) received certification from the New Hampshire Public Utilities Commission for construction of a nuclear power facility near Seabrook. This included approval of three transmission lines. PSCO then applied to the Atomic Energy Commission¹ for permits to construct the plant and to erect the three electric transmission lines along the routes previously approved by the State, which would connect Seabrook to the existing New England electric grid. In June 1976, after extensive hearings considering a variety of routes for each line, as well as numerous other matters, the Atomic Safety and Licensing Board approved issuance of the permits, including all but two of the transmission line routes proposed by PSCO. The major exception was to condition the Seabrook permits on PSCO's use of a dogleg route around the Pow Wow River-Cedar Swamp, rather than through the area, as proposed.² The Pow Wow River-Cedar Swamp is of ecological importance as

¹Section 201(f) of the Energy Reorganization Act of 1974, 42 U.S.C. 5841(f), transferred the licensing and regulatory functions of the former Atomic Energy Commission to the newly created Nuclear Regulatory Commission. "Commission" will be used in this brief to refer to both agencies.

²The Commission also required rerouting one transmission line through an area known as Packer Bog, rather than skirting the bog. PSCO had itself suggested this rerouting to the Commission, noting that approval from the State for the change would be "relatively easy to obtain" (Pet. App. 17).

the only spot where pure stands of white cedar under protective ownership³ are combined with a river marsh and bog.

The Atomic Safety and Licensing Appeal Board affirmed the Licensing Board's decision, specifically rejecting PSCO's attack on the transmission line rerouting (Pet. App. 38-51). The Board found that the rerouting ordered did not conflict with New Hampshire's authorization of the facility; indeed, the New Hampshire Public Utilities Commission had provided that the routes could be relocated later upon request (Pet. App. 4). The Appeal Board held that protection of the Pow Wow River-Cedar Swamp area from the visual insult of two 200-foot high transmission towers with the associated wiring justified the slightly increased cost of the rerouting ordered by the Licensing Board (Pet. App. 42-46). The Commission declined review of this aspect of the Appeal Board's decision (Pet. App. 4).⁴

PSCO then filed a petition for review in the court of appeals. The company did not challenge the finding that rerouting would minimize adverse environmental impacts, but contended that the Commission lacked authority to condition permits on the use of specific transmission line routes. The First Circuit rejected this argument, emphasizing that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, mandated federal agencies "to minimize all unnecessary adverse environmental impact" (Pet. App. 7). In the court's view, compliance with NEPA could be excused only if an agency's specific statutory duties and the requirements of NEPA were mutually exclusive.

³The Society for the Protection of New Hampshire Forests, an intervenor in this case, owns 10-15% of the area (Pet. App. 41).

⁴PSCO estimated that the cost of rerouting the transmission line would be slightly less than \$500,000 (Pet. App. 43).

The court of appeals then proceeded to consider the extent of the Commission's regulatory authority pertaining to transmission lines and concluded that such lines, when associated with a nuclear power plant, qualified as a "utilization facility" (42 U.S.C. 2014(cc)) within the Commission's jurisdiction. And the court rejected the claim based on New Hampshire's approval of the original routes, finding that no question of preemption of state regulation was presented here since the New Hampshire Commission had indicated that a request to alter the approved routes would be entertained.

ARGUMENT

The decision of the court of appeals is correct and consistent with the only other decision on point. It does not merit review by this Court.

The single question presented by this case is whether the Commission, in licensing a nuclear power plant, has authority to minimize the adverse environmental impact resulting from electric transmission lines that will be constructed as part of a nuclear power plant. Notwithstanding petitioner's characterization, the present ruling announces no "sweeping change" (Pet. 8). In issuing a permit, a federal agency cannot avoid evaluating the environmental consequences of that decision. *Zabel v. Tabb*, 430 F. 2d 199, 209, 213 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). The Commission's determination to modify two transmission line routes was not a novel step, but merely the necessary result of its obligation to take into account all environmental factors. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Only an unambiguous statutory conflict could prevent the Commission from considering the environmental consequences of transmission lines. *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-788 (1976).

Nor is the Commission's authority to require rerouting of environmentally damaging lines precluded by Section 271 of the Atomic Energy Act, 42 U.S.C. 2018. That

provision preserves state and local regulation over the "generation, sale, or transmission of electric power." But this is not inconsistent with a federal decision as to the *location* of the transmission lines, any more than a federal decision as to the location of the plant itself. Moreover, in this case the state Commission is willing to consider different routes, and, if New Hampshire does not approve the rerouting, the federal Commission will consider granting PSCO alternate relief.

The present ruling is consistent with the only other decision dealing with the Commission's authority to regulate the routes of transmission lines associated with licensed facilities. In *Culpeper League for Environmental Protection v. NRC*, 574 F. 2d 633 (D.C. Cir. 1978), the Commission's exercise of jurisdiction over transmission lines was inferentially assumed to be correct. The Ninth Circuit's holding in *Maun v. United States*, 347 F. 2d 970 (1965), is not to the contrary. There the Commission itself sought to operate Commission-owned transmission lines in defiance of local ordinances. That is obviously a very different situation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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